

burdensome for the Commission to engage, in the context of its ECO analysis, in an analysis of precisely what information is included, or of what information should or should not be included, in such a publication.

Third, various provisions of the BT License obligate it to protect both carrier and customer proprietary information.<sup>54</sup> The BT-MCI Application also cites to protective safeguards in British law, the statutory powers accorded OFTEL as the principal organ with responsibility for regulatory oversight, the restrictions set out in the general anticompetition law, as well as the powers and remedies of the competition authorities.<sup>55</sup> Furthermore, the BT-MCI Application also cites to the legal restrictions on anticompetitive conduct embedded in the European Community Treaty and the powers and remedies available to the European Commission to address anticompetitive conduct.

FT agrees that the Commission can and should take into account the presence of legal safeguards other than those set out specifically in the Foreign Carrier Entry Order and arising from whatever source of national or regional law may be applicable. In particular, FT has previously stressed to the Commission in great detail that the various provisions of national and European Union law, including the Treaty, applicable directives and other documents, along with the ample enforcement authority and remedies that are expressly made available to Directorate General IV of the European Commission and certain national regulatory authorities, constitute significant protections against anticompetitive behavior.<sup>56</sup> Together, national and supranational safeguards are likely to

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<sup>54</sup> Id. at 46-47.

<sup>55</sup> Id. at 47-51.

<sup>56</sup> See September 15, 1995 Reply Comments of FT in Sprint Order proceeding; September 23, 1996 Reply Comments of FT; and Three volumes on "The Regulation of

have a substantial salutary effect in ensuring that the Commission's objectives -- protecting against anticompetitive practices -- are achieved.<sup>57</sup>

Once again, FT respectfully urges the Commission not to render the ECO test overly restrictive by suggesting that all safeguards cited in the BT-MCI Application are required to meet the ECO test.

#### 4. Regulatory Framework

The fourth ECO factor is the presence of an effective regulatory framework "to develop, implement and enforce legal requirements, interconnection arrangements and other competitive safeguards."<sup>58</sup> The Commission indicated that it will look at separation between the foreign regulator and the operator and whether "there are fair and transparent regulatory procedures."<sup>59</sup> Understandably, the Commission is concerned about "unfair advantages" that the incumbent or dominant carrier might enjoy.

The discussion in the BT-MCI Application of whether the British regulatory system meets the criteria of this fourth ECO factor is scant indeed.<sup>60</sup> Largely, this appears

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the Telecommunications Sector in the European Union, France and Germany" submitted to the Commission.

<sup>57</sup> In this regard, FT strongly disagrees with the prior view expressed by the Commission that "national and E.U. regulatory prohibitions on discriminatory conduct by FT and DT are [not] sufficient to protect competition". See Sprint Order, 11 FCC Rcd at 1860. That conclusion was utterly contrary to the evidence provided to the Commission in the Sprint Order proceeding; indeed, the three applicable sentences in the Sprint Order are completely devoid of any fact to support such conclusion. Moreover, government ownership demonstrably has not, to date, been a hindrance to European Commission investigations into the activities of incumbent telecommunications operators.

<sup>58</sup> Foreign Carrier Entry Order, 11 FCC Rcd at 3894.

<sup>59</sup> Id.

<sup>60</sup> BT- MCI Application, Vol. One, at 43.

to be the case because, according to BT-MCI, the Commission has, apparently, determined that the UK has an effective regulatory authority that meets the ECO test.<sup>61</sup>

FT would have no quarrel with the Commission's conclusion -- in *this* proceeding -- that the UK has an effective regulatory authority. FT, however, is puzzled by how the Commission could reach such conclusion in the context of the Sprint Order. The first opportunity for the Commission to apply the ECO test, adopted in November 1995, to a national regulatory body was the Sprint Order, which it adopted less than three weeks later. No evidence had been adduced in the Sprint proceeding with respect to whether the British regulatory authority met the ECO test, nor could any have been. Thus, for the Commission to conclude summarily in the Sprint Order -- in just one sentence that is wholly bereft of any analysis -- that the United Kingdom meets this fourth ECO factor is, at best, an odd result.

FT is, in particular, troubled because both it and Sprint did, in the context of the Sprint proceeding, provide the Commission with a very substantial amount of information on the effectiveness of the French regulatory system.<sup>62</sup> Nonetheless, even though the French Direction Générale des Télécommunications certainly was independent of FT, and even though its procedures were unquestionably fair, transparent and provision was made for public comment, the Commission summarily dismissed the reams of information that had been provided to it with the statement that there "currently are no such independent regulatory authorities with fair and transparent procedures in France . . . ." <sup>63</sup>

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<sup>61</sup> See Sprint Order, 11 FCC Rcd at 1860.

<sup>62</sup> See Three volumes on "The Regulation of the Telecommunications Sector in the European Union, France and Germany" submitted to the FCC; September 15, 1995 Reply Comments of France Telecom..

FT strongly disputes the conclusion reached by the Commission with respect to whether there was, at the time of the Sprint Order, an effective regulatory framework in place in France. Nonetheless, FT does not intend to revisit that question because the French regulatory framework, as the Commission knows, has undergone further and very substantial changes with respect to both adopting a new structure that is unquestionably independent of FT and to effecting and implementing fair and transparent procedures.<sup>64</sup>

Nevertheless, given the Sprint Order, FT is concerned that the Commission's articulation of the elements of this fourth ECO factor has been less than consistent. If the Commission takes the invitation of BT-MCI to conclude summarily that the British regulatory framework is adequate, it will be far from clear to other countries -- and, therefore, to foreign carriers seeking to enter the US market -- what regulatory environments will pass muster. Nevertheless, the Commission should avoid a restrictive articulation of the regulatory characteristics sought pursuant to this factor of the ECO test. In this regard, FT notes that the Commission has recently shown sensitivity on this issue by allowing New Zealand to pass the ECO test despite the absence of a sector specific regulator, and more generally by noting that "the Commission's ECO test does not require a regulatory regime exactly patterned on that which exists in the United States."<sup>65</sup>

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<sup>63</sup> Sprint Order, 11 FCC Rcd at 1860.

<sup>64</sup> Sprint's July 31, 1996 Progress Report; September 23, 1996 Reply Comments of FT.

<sup>65</sup> TCNZ Order at ¶ 33.

#### IV CONCLUSION

FT respectfully suggests that, if the Commission approves the BT-MCI Application, the Commission should impose the conditions presented in Section II of the above comments, to the extent such conditions fall within its jurisdiction as determined in coordination with the European Commission. FT expresses no opinion on whether the UK passes the ECO test, but respectfully requests that the Commission not apply its ECO test in a restrictive, inconsistent or unpredictable manner which would have the unintended consequence of indeed hindering the furtherance of competition.

FT respectfully submits that any consideration of the limited *de facto* competition in the UK market would risk rendering the ECO test less predictable and lead the Commission down a slippery slope toward an approach involving micro-management of foreign liberalization developments. Such an approach would require the Commission to undertake the awkward task of reviewing in detail a complicated and evolving market and to take into account factors such as the activities listed in the attached memorandum<sup>66</sup> which describes certain activities of BT during the last 12 months which have been or could be regarded as anti-competitive. In the interest of further clarity of ECO test jurisprudence, FT respectfully urges the Commission to focus its analysis on the concrete *de jure* elements presented in the BT-MCI Application without getting bogged down by

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<sup>66</sup> Memorandum on anti-competitive behaviour, January 23, 1997, prepared by the firm of Allen & Overy for Global One.

the BT-MCI Application's view of the current state of the UK market which would be difficult for the Commission to verify.

Respectfully submitted,

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January 24, 1997

**Memorandum on anti-competitive behaviour**

This memorandum describes the activities of BT during the last 12 months which have been or could be regarded as anti-competitive.

**1. BT/BSkyB marketing alliance (October 1996)**

A complaint was made to OFTEL and to the European Commission by General Cable that the joint marketing of satellite and telephone services by BSkyB and BT was anti-competitive. BT and BSkyB announced in September a plan to give satellite dish subscribers £3.30 worth of free BT supplied telephone calls a month, cheaper installation charges and monthly subscription rates to BSkyB subscribers for a limited time. OFTEL requested information from BT and BSkyB about the marketing deal. The deal was alleged to be anti-competitive as both BT and BSkyB have dominant positions in their respective markets. Apparently, BSkyB also expected BT to be involved in the marketing of digital decoder boxes. On 22nd October, 1996, the Director General announced that he considered the terms of the plan breached BT's licence not to unduly prefer, or discriminate against, other persons. The Director General issued a provisional order requiring BT to cease participating in and publicising the plan. On 20th December 1996, the Director General announced that BT had complied with the provisional order and that he would not issue a final order confirming the provisional order. The provisional order lapsed on 22nd January, 1997.

**2. ISDN prices (August/September 1996)**

OFTEL announced that they are reviewing BT's new prices and price structure in relation to its ISDN2 services to ensure that the pricing is not anti-competitive. OFTEL stated that they are keen to promote a greater take-up of ISDN and to ensure that third party competing network operators that want to provide basic rate ISDN services (using indirect connection over BT's local loop infrastructure) are not discouraged from doing so.

On 26th September, 1996, the Director General told BT to remove discriminatory elements of its ISDN2 tariffs. Concerns were raised about both BT's position as the dominant supplier and its prices. Ofel was willing to give BT the freedom to price responsibly but BT initially took minimal account of its concerns, its prices neither meeting the needs of customers nor avoiding anti-competitive effects on other operators. They effectively discouraged customers from using operators other than BT and tied them in to taking service from BT.

On 3rd October, 1996, BT announced price cuts in relation to its ISDN2 services. OFTEL welcomed these changes and stated that these changes addressed the anti-competitive aspects that had previously been identified.

**3. Customer contact practices (July 1996)**

OFTEL received a complaint from the Consumers Association that BT was giving customers misleading information about the telephone services of cable companies. Allegations had been received by OFTEL that BT had:

- (1) given information about what a particular cable company charged for engaged calls;

- (ii) stated that cable company customers would have to pay to be included in the BT phone book;
- (iii) stated that some of BT's call rates were the same as that offered by a competing cable company (when in reality BT's charges were usually more expensive);
- (iv) given information about BT's own rates which were false; and
- (v) made allegations that cable operators could be less than reputable (with no proof being given to back up such claims).

OFTEL announced that it would be investigating these complaints to ensure that BT was complying with its obligations under its licence not to unduly discriminate against customers or competitors.

At the end of July 1996, OFTEL announced that it had received further allegations by cable companies that BT had contacted ex-directory customers of cable operators and that it had denigrated CableTel (UK) Limited ("CableTel") in a BT promotional video (as to which see below). OFTEL stated that they would take into account any additional evidence provided by the Cable Communications Association and/or CableTel in its investigation.

OFTEL's investigation found that many of the allegations were substantiated and that BT's marketing team had behaved unsatisfactorily from a fair trading point of view, and that such behaviour could have an adverse effect on competition. In order to ensure that BT complied with its responsibilities not to abuse its dominant position, the Director General issued on 3rd September, 1996 a provisional Order requiring BT to ensure that its staff did not mislead customers when commenting on competitors' activities and complied with its licence in this regard. BT was required to establish controls and internal compliance procedures to ensure the clearance of information which it made available to its marketing department and to ensure that staff who had not had the appropriate training did not make any comparisons between BT and cable operators. On 31st October, 1996, the Director General announced that a new complaint concerning information BT gives about its competitors had been made.

The provisional Order was in place for a period of 3 months. On 2nd December, 1996, the Director General announced that BT had taken sufficient steps to address the initial concerns (including the implementation of a compliance plan) and that he would not make a final order confirming the provisional order. However, the Director General also stated that he would continue to monitor BT's behaviour in this area and would not hesitate to take further action should BT's own actions not prove sufficient to prevent further material breaches.

#### 4. Indirect access (July 1996)

OFTEL expressed that its policy towards indirect access was that it should be available from BT due to BT's dominant position in the market, i.e. BT's customers should be able to buy telecommunication services from other network operators to which it may not be directly connected. OFTEL invited comments on the indirect market to reach them by 30th September, 1996.

Although there are no public statements of allegations of anti-competitive behaviour in relation to indirect access, there are considerable barriers to the growth and delivery of indirect access services such as the absence of suitable short number codes. Indirect access operators have



complained that these barriers exist and that BT is not actively working to have them removed. These should, however, be addressed through the consultative process and the "Residual barriers to competition" project which Ofel is also conducting.

5. **Classified directory advertising services (July 1996)**

The Monopolies and Mergers Commission ("MMC"), in its report following a reference by the Office of Fair Trading ("OFT"), found that BT was exploiting its monopoly position in the classified directory advertising services market by charging high prices to advertisers. They also found that BT's publication of local directories was likely seriously to weaken competition. The MMC has recommended that the rates for advertising be subject to price controls and reduced by 2 per cent. per annum in real terms and that BT be prohibited from covering any area with more than one classified directory. BT would also be required to publish annual accounts for its classified directory business.

6. **Misuse of customer information (June/July 1996)**

OFTEL investigated allegations that BT called ex-directory customers of cable telephone companies in an attempt to persuade them to re-join BT and that as a result BT had misused customer information. After an investigation by OFTEL into these allegations, OFTEL found that, even though BT had not misused customer information - BT's explanation was that there had been a computer encoding error which had resulted in ex-directory customers' information being provided to its marketing team by mistake - BT should have been more careful and fully checked and tested its methods of compiling information. OFTEL also stated that BT had fallen short of the standard required, namely meeting the high standards of fairness and propriety. This was particularly so in the case of an operator with BT's market share and resources. Some cable company customers had also been given the impression that BT had been supplied the numbers by the cable companies themselves and OFTEL stated that it was incumbent on BT to ensure that there was no risk that a cable company customer should believe that a cable operator would breach a customer's confidence in such a manner. OFTEL stated that it would keep a close check on the market to ensure that BT does not use unfair means to win customers.

Further allegations from the cable industry have been made of BT contacting ex-directory customers and activities of BT denigrating sales methods and the integrity of a certain cable operator (as to which see above).

7. **Mobile phone contract terms (June 1996)**

BT was warned by the Office of Fair Trading, along with most of the other major mobile telephone suppliers in the UK, in relation to unfair terms in consumer contracts, i.e. terms which unduly weight the contract against the consumer and in favour of BT. These terms included the length of time consumers were tied into the contract, the lack of a "cooling off" period once the contract was signed and the fees payable for disconnecting from a service.

8. **Promotion of Caller Display Service (June 1996)**

BT's planned promotion of its Caller Display Service in association with a Caller Display Equipment promotion was ruled by OFTEL to give BT an unfair advantage in relation to its equipment business as far as supplying the Caller Display equipment was concerned. It was ruled by OFTEL that BT had failed to give sufficient advance notice to other third party

suppliers of Caller Display equipment of its intended promotion so that they could meet increased demand of equipment and prepare promotional material. The Director General ruled that BT was in breach of its fair trading obligations not to show undue discrimination against, or undue preference towards, third parties and a provisional Order was issued by OFTEL requiring BT to:

- (a) when promoting any telecommunication service (i.e. not just the Caller Display Service) not to do so in an way so as to unfairly favour to a material extent any business carried on by BT in the supply of equipment for use in connection with the telecommunication services promoted to the competitive disadvantage of competing equipment suppliers;
- (b) to provide to those undertakings which do or are likely to compete with BT in the supply of substitutable equipment sufficient advance notice of any promotion of an existing service, or the introduction of a new service, to enable such competitors sufficient time to gather and prepare promotional material and stocks to meet any reasonably foreseeable increased demand for equipment resulting from such promotion; and
- (c) to ensure that any promotional material and publicity of BT makes clear that the promotion is not contingent on buying or renting equipment from BT and that equipment may be bought or rented from other suppliers.

On 25th September, 1996, the Director General confirmed this Order. The Order is intended to give force to BT's obligation not to discriminate under its licence and allow third parties which are damaged by a breach of the Order to sue BT directly for any damages incurred. This is intended in view of all the complaints received to attempt to ensure that BT does not have an unfair advantage in relation to the promotion and introduction of new telephone equipment and that BT gives other suppliers advance notice of forthcoming promotions. This order is to be reviewed by OFTEL after one year.

#### 9. Number portability (December 1995)

It is generally accepted amongst the industry and consumer bodies that number portability is an essential requirement for the development of effective competition. The introduction would remove barriers to entry for prospective operators, would encourage efficiency and stimulate operators to market new customers. Research showed that the absence of number portability was a significant deterrent to changing operators. A condition was introduced into BT's licence in 1991 dealing with number portability but, given that the effect would be loss of customers to BT, it had an interest in delaying its introduction and consistently proposed to operators seeking it high charges. The licence condition gave Ofel the power to direct that number portability be offered but allowed BT to recover its reasonable costs in doing so.

BT refused to accept a modification to its licence allowing Ofel to allocate the costs of portability between BT and other operators. The matter was referred to the MMC whose findings were published in December 1995. The MMC recommended that BT's licence should be modified to enable the Ofel to allocate BT's portability costs on a basis which would result approximately in a 70:30 split of those costs between BT and other operators. It concluded that the absence of number portability was a considerable obstacle to competition and that if BT's licence remained unchanged there would be further protracted argument about the allocation and level of costs such that restricted number portability would be available

preventing the promotion of full and effective competition. This was against the public interest.

**10. Interconnection (December 1995)**

BT has had numerous complaints levelled against it in relation to interconnection and the entering into of interconnection agreements. These complaints range from delays in providing information such as network information to enable the technical aspects of the agreement to be finalised to the charges to be made for each service provided. Under pressure from the industry, a standard interconnection agreement has been developed which contains standard interconnection charges determined by Oftel on an annual basis. Oftel has had difficulty in finalising these charges as a result of lack of agreement with BT as to the basis of BT's costs underlying those charges.

**11. Satellite services (November 1995)**

BT was found in breach of its licence for showing undue discrimination and undue preference in connection with its tariffs for satellite uplinking services and backhaul circuits.

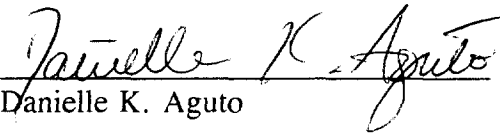
**12. Telephone Equipment (September 1995)**

Oftel had been investigating complaints from a number of BT's competitors about the supply of telephones, answering machines and fax machines in the domestic and small business market. Oftel concluded that BT supplied such equipment in the wholesale market and from BT shops on a basis which is unfairly subsidised, and that this is harming or likely to harm BT's competitors. Oftel therefore directed BT to eliminate the subsidies to the relevant BT businesses and to provide financial and other information to allow Oftel to judge whether the relevant BT businesses are subsidised in the future.

**23rd January, 1997**

**CERTIFICATE OF SERVICE**

I, Danielle K. Aguto, hereby certify that on this 24th day of January 1997, a true copy of the foregoing Comments of France Telecom was hand-delivered to the persons indicated by an asterisk (\*) on the attached service list, and a true copy was sent by first-class mail, postage prepaid, to the other persons listed.

  
Danielle K. Aguto

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